

Was the Flag Burning Amendment Unconstitutional?

Jeff Rosen

Imagine this: even if the Flag Burning Amendment¹ to the United States Constitution had been proposed by Congress and ratified by the states, it would have been unenforceable by the courts as an unconstitutional violation of natural rights retained by the people and protected by Article V and by the Ninth Amendment.

In taking seriously the bizarre possibility of an unconstitutional amendment, I will suggest that the Flag Burning Amendment was flawed much more deeply than lawmakers thought when they rejected it, twice.² During Senate Judiciary Committee hearings in 1989, critics suggested that the Amendment might have been unenforceable because it purported to grant Congress a power that clashed with a right reserved by the First Amendment.³ Senate critics assumed, however, that the defects of the Flag Burning Amendment could have been cured by a clear statement of Congress's desire to override the First Amendment.⁴

I will argue that even if the Flag Burning Amendment *had* purported to carve an exception out of the First Amendment, or even if it had repealed the First Amendment entirely, then it still would have been unenforceable and unconstitutional. For if the rights of speech are natural rights "retained by the people," rather than positive rights granted by the Constitution (as both James Madison and Roger Sherman suggested in 1789⁵ and as state constitutions

1. H.R.J. Res. 350 and S.J. Res. 332, 101st Cong., 2d Sess. (1990) ("The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States."); *see also* S.J. Res. 180, 101st Cong., 1st Sess. (1989).

2. On October 19, 1989, the first Flag Burning Amendment failed in the House. On June 21 and 26, 1990, the second Flag Burning Amendment failed in the House and Senate.

3. *See, e.g., Measures to Protect the Physical Integrity of the American Flag: Hearings on S. 1338, H.R. 2978, and S.J. Res. 180 Before the Comm. on the Judiciary*, 101st Cong., 1st Sess. 536-39 (1989) [hereinafter *Hearings*] (testimony of Prof. Walter Dellinger).

4. *See, e.g., id.* at 597.

5. In the notes for his speech introducing the Bill of Rights, Madison distinguished between "*natural rights*, retained as speech" and "positive rights resultg. as trial by jury." 5 THE WRITINGS OF JAMES MADISON 389 n.1 (G. Hunt ed. 1904). In his own working draft for a Bill of Rights, Roger Sherman proposed an article identifying the "natural rights which are retained" during the transition to civil society:

Such are the rights of Conscience in matters of religion; of acquiring property and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances.

suggest today⁶), then the people cannot "divest themselves or their posterity" of the rights, even by consent. Therefore, I will argue, even if the natural rights of speech were not enumerated in the First Amendment, they would remain, by definition, "retained by the people" and judicially enforceable through the Ninth Amendment.

In the course of proposing a historically rooted argument for natural rights limitations on the people's power to amend the Constitution, I will also propose a historically rooted standard for limiting the scope of the Ninth Amendment. Popular conceptions of which rights are natural and "retained by the people," I will argue, were more determinate two hundred years ago, and are more determinate today, than courts and commentators have assumed. Like the Founding generation, successive generations have enumerated the rights they believe to be natural in their state constitutions and declarations of rights. Just as the Supreme Court consults past and present state constitutions as evidence of an evolving "national consensus" about what constitutes cruel and unusual punishment under the Eighth Amendment,⁷ so the Court should look to past and present state constitutions to help determine which rights are natural and "retained by the people" under the Ninth Amendment.

Part I will ask: which natural rights did the ratifiers of the Bill of Rights in 1791, and do Americans in 1991, recognize as natural and retained, and what are the consequences for the scope of the Ninth Amendment? Part II will examine the relationship between natural rights recognized in past and present state constitutions (in particular, between the collective natural right of amendment and individual natural rights such as conscience and speech), and will identify limitations on the amendment process itself. Part III will apply the conclusions of Parts I and II to test the constitutionality of the Flag Burning Amendment, and will suggest that the Amendment could have been enforced only if it had denied explicitly that speech is a natural right.

I. ENUMERATING NATURAL RIGHTS

A. *Natural Rights at the Founding*

The Founding generation disagreed about many things, but the existence of natural rights was not one of them. From James Madison to Roger Sherman,

Roger Sherman's Draft of the Bill of Rights (1789), reprinted in *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* 351 app. (R. Barnett ed. 1989) [hereinafter *THE RIGHTS RETAINED BY THE PEOPLE*].

6. See, e.g., KY. CONST. § 1 ("All men" have the "inherent and inalienable right[] . . . [of] freely communicating their thoughts and opinions."); UTAH CONST. art. I, § 1 (same).

7. See, e.g., *Stanford v. Kentucky*, 109 S. Ct. 2969, 2971 (1989) (in identifying "evolving standards of decency," Court looks to "primary and most reliable evidence of national consensus—the pattern of federal and State laws").

from *The Federalist Papers*⁸ to the Antifederalist papers,⁹ both supporters and opponents of the Constitution repeatedly affirmed their shared belief in natural rights. Virtually all commentators agree that the Framers and ratifiers of the Bill of Rights believed in natural rights as a general matter.¹⁰

The assumption that the Founders believed in natural rights leads most commentators to conclude that the Ninth Amendment was intended to protect natural rights, yet they are unable to explain precisely why. On the one hand, one recent commentator suggests that Madison's reference to rights "retained by the people" added nothing to a precursor of the Ninth Amendment proposed by Virginia, which had declared "[t]hat those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever, to extend the powers of Congress"¹¹ On the other hand, other commentators assume that the phrase "retained by the people" simply refers to rights recognized by state constitutions, statutes, and common law when the Constitution was ratified.¹² Still others argue sweepingly that all state constitutional rights, past and future, are somehow "federalized by the ninth amendment."¹³ But the documentary sources of the Bill of Rights suggest a much more specific understanding of the phrase "retained by the people." Rather than referring to positive rights retained during the transition from the Articles of Confederation to the Constitution (and rather than suggesting simply a rule for construing enumerated powers) the phrase is used repeatedly in the ratification period to refer to natural rights "retained" during the transition from the state of nature to civil society.

"[W]hatever portion of those natural rights we did not transfer to the government, was still preserved and retained by the people," said Thomas Hartley in the Philadelphia ratifying convention.¹⁴ "If we have this inherent, this unalienable, this indefeasible title to those rights," said Richard Maclaine in the North Carolina ratifying convention, "if they are not given up, are they

8. See THE FEDERALIST No. 2, at 37 (J. Jay) (C. Rossiter ed. 1961) (whenever government "is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers"); see also *id.*, No. 43, at 279 (J. Madison) ("the transcendent law of nature and of nature's God . . . declares that the safety and happiness of society are the objects at which all political institutions aim"). See generally M. WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION (1987).

9. See, e.g., *The Letters of "John De Witt,"* in THE ANTIFEDERALISTS 98 (C. Kenyon ed. 1985) ("A people, entering into society, surrender such a part of their natural rights, as shall be necessary for the existence of that society.").

10. "[E]ven moral skeptics . . . do not deny that the founding generation, as a general matter, accepted the idea of natural rights." Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 155 (1988).

11. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1278 (1990).

12. See, e.g., Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 259 (1983).

13. Massey, *Antifederalism and the Ninth Amendment*, 64 CHI.-KENT L. REV. 987, 996 (1989); see also Schnurer, *It Is a Constitution We Are Expanding*, 1 EMERGING ISSUES IN STATE CONST. L. 135, 158-59 (1988). This argument seems to turn the supremacy clause on its head. See U.S. CONST. art. VI.

14. 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 654 (1971) (Nov. 30, 1788).

not retained?"¹⁵ In his working draft for the Bill of Rights, Roger Sherman proposed an article declaring that "[t]he people have certain natural rights which are retained by them when they enter into Society"¹⁶ And in introducing the Bill of Rights to the First Congress, Madison referred to natural rights as "those rights which are retained when particular powers are given up to be exercised by the Legislature."¹⁷

Drawing on familiar social compact theorists such as John Locke,¹⁸ Jean Jacques Burlamaqui,¹⁹ and Francis Hutcheson,²⁰ the Founding generation also distinguished frequently (although not always carefully or consistently) between alienable and unalienable natural rights. The most rigorous theoretical distinctions occur in the New Hampshire Constitution of 1784 and in the Essex Result, an influential declaration by one of the conventions summoned to ratify the Massachusetts Constitution of 1780. "When men enter into a state of society," says the New Hampshire Constitution:

they surrender up some of their natural rights to that society, in order to insure the protection of others; and, without such an equivalent, the surrender is void. [] Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the RIGHTS OF CONSCIENCE.²¹

The Essex Result clarifies the distinction and defines the "equivalent":

15. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 161 (J. Elliot ed. 1888) (July 29, 1788) [hereinafter ELLIOT'S DEBATES]. Later, James Iredell sharpens Maclaine's distinction: "Those rights which are unalienable are not alienated. They still remain with the great body of the people." *Id.* at 166-67.

16. Roger Sherman's Draft of the Bill of Rights, *supra* note 5.

17. 1 ANNALS OF CONGRESS 454 (J. Gales ed. 1834) (June 8, 1789). In the notes for his speech, Madison repeated the phrase, referring to "natural rights. retained as speech." 5 THE WRITINGS OF JAMES MADISON, *supra* note 5, at 389 n.1.

18. Although Locke's doctrine is one of *natural* rights, not *inalienable* rights, G. MACE, LOCKE, HOBBS, AND THE FEDERALIST PAPERS 24 (1979), Locke's implicit distinction between alienable powers and unalienable rights influenced several revolutionary declarations. Compare J. LOCKE, SECOND TREATISE OF GOVERNMENT § 23, at 128 (W. Carpenter ed. 1986) (1st ed. 1690) with The Rights of Colonists and a List of Infringements and Violations of Rights, 1772, reprinted in 1 B. SCHWARTZ, *supra* note 14, at 202 ("the right to freedom being the gift of God Almighty, it is not in the power of Man to alienate this gift, and voluntarily become a slave").

19. Burlamaqui, along with Locke and Coke, was among the authors most cited by the colonial polemicists. C. MULLEN, FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION 78 (1933). Burlamaqui's argument that natural rights which are connected to natural duties cannot be renounced influenced both Thomas Jefferson and James Wilson. See M. WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 161, 227 (1978).

20. "Some authors have noticed that Jefferson took his division of rights into alienable and unalienable from Hutcheson, who had made the distinction popular and important." G. WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 213 (1978).

21. N.H. CONST. of 1784, §§ III, IV, reprinted in 2 B. POORE, FEDERAL AND STATE CONSTITUTIONS 1280-81 (1878). The New Hampshire Constitution goes on to define the rights of conscience as the "natural and unalienable right to worship God according to the dictates of . . . conscience, and reason." *Id.* § V.

Some . . . [natural] rights are alienable, and may be parted with for an equivalent. Others are unalienable and inherent, and of that importance, that no equivalent can be received in exchange. . . . [T]he supreme power is limited, and cannot controul the unalienable rights of mankind, nor resume the equivalent (that is, the security of person and property) which each individual receives, as a consideration for the alienable rights he parted with in entering into political society.²²

But are *all* natural rights, alienable as well as unalienable, “retained by the people”? Although the answer has sweeping consequences for the scope of the Ninth Amendment, no commentator has bothered to pose the question. Some, carelessly, overlook alienable natural rights entirely and assume that all natural rights are unalienable.²³ Others, perhaps, assume that if unalienable rights must be retained, alienable rights must be surrendered. But both assumptions are unfounded.

The Revolutionary declarations suggest that while *the power to control* alienable natural rights may be surrendered to government under certain circumstances, the alienable rights themselves are retained by the people: “Sometimes we shall mention the surrendering of a power to controul our natural rights,” says the Essex Result, “which perhaps is speaking with more precision, than when we use the expression of parting with natural rights—but the same thing is intended.”²⁴ The distinction between natural rights, which are retained, and the power to control them, which is surrendered, may seem delicate, but it was essential to social contract theory: “Nobody can give more power than he has himself, and he that cannot take away his own life cannot give another [ultimate] power over it,” said Locke, while stressing the need for man to “give up” the power “of doing whatsoever he thought fit for the preservation of himself and the rest of mankind . . . to be regulated by laws made by the society”²⁵

The power to control alienable natural rights, in other words, can be surrendered in exchange for greater security and safety; but both alienable and unalienable natural rights themselves are “retained by the people” and protected by the Ninth Amendment.

22. Result of the Convention of Delegates Holden at Ipswich in the County of Essex, Who Were Deputed to Take into Consideration the Constitution and Form of Government Proposed by the Convention of the State of Massachusetts-Bay (1778) [hereinafter *Essex Result*], reprinted in 1 B. SCHWARTZ, *supra* note 14, at 349, 352.

23. See, e.g., M. ADLER, *WE HOLD THESE TRUTHS* 48 (1987) (“If human rights are natural rights, as opposed to those that are civil, constitutional, or legal, then their being rights by natural endowment makes them *inalienable*”) (emphasis in original); see also McAfee, *supra* note 11, whose failure to distinguish between alienable and unalienable rights leads him to conclude that Federalists believed “that even inalienable rights may be granted away.” *Id.* at 1267. For evidence to the contrary, see *infra* notes 83-84 and accompanying text.

24. *Essex Result*, *supra* note 22, at 349.

25. J. LOCKE, *supra* note 18, § 23, at 128, § 129, at 181.

The same commentators who assume that the Ninth Amendment was intended to recognize the existence of natural rights are unable to specify *which* natural rights in particular the Ninth Amendment was intended to recognize.²⁶ Everyone assumes, of course, that the Framers of the Bill of Rights recognized the natural rights enumerated in the Declaration of Independence,²⁷ and there is a vast ocean of historical literature discussing the relationship between Jefferson's Declaration and the Constitution.²⁸ But by all but ignoring the scores of references to natural rights in the Revolutionary state constitutions and in the state ratifying conventions,²⁹ most commentators have assumed that the Founders' conception of natural rights is too indeterminate to be enumerated. As a result, from the left to the right, from John Ely³⁰ to Raoul Berger,³¹ commentators have assumed that judicial efforts to identify unenumerated natural rights must be an exercise in noninterpretive review, without basis in the text, history, or structure of the Constitution or Bill of Rights.³²

But the assumption, so central to current Ninth Amendment doctrine, is entirely unfounded. The documentary sources of the Bill of Rights³³ reveal that conceptions of natural rights were much more determinate two hundred years ago than both commentators and courts suppose today—so determinate, in fact, that only three groups of rights are repeatedly called natural or unalienable in the Revolutionary declarations and state ratifying conventions: the

26. See, e.g., Moore, *The Ninth Amendment—Its Origins and Meaning*, 7 NEW ENG. L. REV. 215, 301 (1972); Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 CHI.-KENT L. REV. 177, 179 (1988). None of the 12 essays in a new anthology about the history and meaning of the Ninth Amendment attempts systematically to enumerate which rights the founders considered natural. See THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 5. But see Barnett, *James Madison's Ninth Amendment* in *id.* at 35-37 (recognizing that historical sources exist to identify rights founders considered retained by the people).

27. See, e.g., McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 99 (1988).

28. See, e.g., C. BECKER, *THE DECLARATION OF INDEPENDENCE* (1922); M. WHITE, *supra* note 19; G. WILLS, *supra* note 20.

29. For passing references to natural rights in general discussions of Revolutionary declarations and constitutions, see, e.g., W.P. ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKINGS OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 145-46 (1980). For a more thorough discussion, see, e.g., B. WRIGHT, *AMERICAN INTERPRETATIONS OF NATURAL LAW* 62-148 (1931).

30. See J. ELY, *DEMOCRACY AND DISTRUST* 49 (1980) ("A broadly accepted natural law philosophy surely could have found a place . . . in the Bill of Rights. But such philosophies were not that broadly accepted."). Ely's argument that a determinate conception of natural rights could have been enumerated in a "frame of government" overlooks the fact that natural rights *were* enumerated in five Revolutionary declarations of rights, all of them incorporated into frames of government. See *infra* notes 33-39 and accompanying text.

31. See Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 24-25 (1980).

32. Thomas Grey, for example, conceding far too much, defines his search for natural rights principles as an exercise in "noninterpretive review," whose "normative content is not derived from the language of the Constitution as illuminated by the intent of its framers." Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 844 n.8 (1978).

33. The amendments originally proposed by Madison to the First Congress were selected from the amendments proposed by state ratifying conventions, which were selected, in turn, from the Revolutionary Declarations of Rights. See B. SCHWARTZ, *supra* note 14.

individual right to "worship God according to the dictates of conscience";³⁴ the individual right of "defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety";³⁵ and the right of a majority of the people to "alter and abolish" their government.³⁶ Three other rights are also called natural in the documentary sources: the right to emigrate or to form a new state,³⁷ the rights of assembly,³⁸ and the freedom of speech.³⁹

If the Founders' conception of which rights were natural is clear, their conception of which natural rights were alienable and which were unalienable is less so. The rights of religious conscience⁴⁰ and the right of revolution⁴¹

34. The Virginia, New York, North Carolina, and Rhode Island ratifying conventions proposed amendments to the Constitution declaring that the people have an "equal, natural, and unalienable right" to the free exercise of religion, according to the dictates of conscience. 3 ELLIOT'S DEBATES, *supra* note 15, at 659 (Virginia); 4 *id.* at 244 (North Carolina); 2 B. SCHWARTZ, *supra* note 14, at 912 (New York); H.R. Doc. No. 398, 69th Cong., 1st Sess. 1052 (1927) (Rhode Island). Five Revolutionary declarations of rights call the right to worship God according to the dictates of conscience "unalienable." PA. CONST. of 1776, § 2, *reprinted in* 2 B. POORE, *supra* note 21, at 1541 (1878); DEL. DECLARATION OF RIGHTS of 1776, § 2, *reprinted in* 1 B. SCHWARTZ, *supra* note 14, at 277; N.C. CONST. of 1776, § XIX, *reprinted in* 2 B. POORE, *supra* note 21, at 1410; VT. CONST. of 1777, ch. I, § III, *reprinted in* 2 *id.* at 1859; N.H. CONST. of 1784, art. I, § IV, *reprinted in* 2 *id.* at 1280-81.

35. PA. CONST. of 1776, art. I, *reprinted in* 2 B. POORE, *supra* note 21, at 1541; VA. BILL OF RIGHTS of 1776, § 1, *reprinted in* 2 *id.* at 1908; MASS. CONST. of 1780, pt. I, art. I, *reprinted in* 1 *id.* at 957; N.H. CONST. of 1784, art. I, § II, *reprinted in* 2 *id.* at 1280. Two state ratifying conventions proposed amendments declaring the rights of life, liberty, property, and happiness to be "natural." See 3 ELLIOT'S DEBATES, *supra* note 15, at 657 (Virginia); 4 *id.* at 243 (North Carolina).

36. Madison's proposed amendment, calling the right to "reform or change" government "unalienable," 1 ANNALS OF CONGRESS, *supra* note 17, at 452, relied on the language of four Revolutionary constitutions. See VA. BILL OF RIGHTS of 1776, § 3, *reprinted in* 2 B. POORE, *supra* note 21, at 1908-09; PA. CONST. of 1776, art. V, *reprinted in* *id.* at 1541; VT. CONST. of 1777, ch. I, art. VI, *reprinted in* 2 *id.* at 1859; MASS. CONST. of 1780, pt. I, art. VII, *reprinted in* 1 *id.* at 958.

37. PA. CONST. of 1776, art. XV, *reprinted in* 2 B. POORE, *supra* note 21, at 1542; VT. CONST. of 1777, ch. I, art. XVII, *reprinted in* 2 *id.* at 1860.

38. "If people freely converse together," said Mr. Sedgwick, "they must assemble for that purpose; it is a self-evident, unalienable right which the people possess . . ." 1 ANNALS OF CONGRESS, *supra* note 17, at 759 (Aug. 15, 1789).

39. In addition to Madison's and Sherman's references to speech as a "retained" natural right, see *supra* note 5, the rights of speech were called "inherent" during the debate in the First Congress. "The committee who framed this report," said Mr. Benson, "proceeded on the principle that these rights [of free expression] belonged to the people; they conceived them to be inherent; and all that they meant to provide against was their being infringed by the Government." 1 ANNALS OF CONGRESS, *supra* note 17, at 759 (Aug. 15, 1789); see also St. George Tucker's notes on the American edition of Blackstone's Commentaries:

Thought and speech are equally the immediate gifts of the Creator, the one being intended as the vehicle of the other: they ought, therefore, to have been wholly exempt from the coercion of human laws in all speculative and doctrinal points whatsoever: liberty of speech in political matters, has been equally proscribed in almost all the governments of the world, as liberty of conscience in those of religion.

1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 11 app. G (St. G. Tucker ed. 1803) [hereinafter TUCKER'S BLACKSTONE]. In equating speech with freedom of religious conscience as "absolute," natural rights of Americans, Tucker "follows the point of view so often set forth during the previous [Founding] generation." B. WRIGHT, *supra* note 29, at 287-88.

40. Madison's *Memorial and Remonstrance against Religious Assessments* of June, 1785, gives two reasons why the free exercise of religion "is in its nature an unalienable right." First, the opinions of men depend only on evidence contemplated by their own minds; therefore, they cannot transfer to others the right to judge for them what opinions to hold. Second, rendering homage to the Creator is a divine duty,

are consistently called unalienable in the documentary sources and in the social compact theories on which the sources relied. The status of the rights to defend life, liberty, and property is fuzzier: social compact theory suggests that the power to control them is alienable rather than unalienable, and should be surrendered to the state which promises, in exchange, to authorize deprivations only by due process of law.⁴² George Mason, the author of the 1776 Virginia Declaration of Rights, had called the rights to defend life, liberty, and property not unalienable but "inherent" (a familiar synonym for natural).⁴³ Jefferson, writing the Declaration of Independence months later, took care to remove property from his list of unalienable rights,⁴⁴ and to call the rights of life and liberty themselves (not the right to defend them) unalienable. So when three subsequent declarations of rights inserted the word "unalienable" in front of Mason's list,⁴⁵ they may have noted the superficial similarity between Jefferson's language and Mason's, and carelessly combined them.

Although Madison and Sherman do not appear to have thought carefully about the distinction, they must have viewed speech, too, as an alienable rather than an unalienable right when both of them cited it as an example of the "natural rights retained" during the transition to civil society.⁴⁶ Despite the absolute prohibitory language of the First Amendment,⁴⁷ and despite Madison's earlier statement "that the liberty of conscience and freedom of the press were [understood to be] *equally* and *completely* exempted from all authority whatever of the United States,"⁴⁸ the Founders clearly did not object to restrictions on speech by state governments; nor were they unduly concerned by congressional restrictions that seem draconian today.⁴⁹ Most of the federal and state restrictions were designed, ostensibly, to increase the security and safety of individuals and society, making them consistent with a conception of speech as an alienable natural right. If speech is alienable rather than unalienable, furthermore, it can be reconciled with most contemporary exceptions to

which would be violated by renouncing the right to perform it. M. WHITE, *supra* note 8, at 32.

41. Like the rights of conscience, the rights of revolution are derived from a divine duty. Many have noted the similarity between Jefferson's passage in the Declaration of Independence concluding, "[I]t is their right, it is their duty to throw off [a despotic] government," and section 225 of Locke's Second Treatise. See M. WHITE, *supra* note 19, at 244 n.17. Earlier, Locke explained why the right of revolution cannot be alienated: "For no man or society of men having a power to deliver up their preservation . . . to the absolute will and arbitrary dominion of another . . . they will always have a right to preserve what they have not a power to part with . . ." See J. LOCKE, *supra* note 18, § 149, at 192-93.

42. See M. WHITE, *supra* note 19, at 203-28.

43. VA. BILL OF RIGHTS of 1776, § 1, reprinted in 2 B. POORE, *supra* note 21, at 1908.

44. G. WILLS, *supra* note 20, at 230.

45. See PA. CONST. of 1776, art. 1, reprinted in 2 B. POORE, *supra* note 21, at 1541; VT. CONST. of 1777, ch. I, art. I, reprinted in 2 *id.* at 1859; MASS. CONST. of 1780, pt. I, art. I, reprinted in 1 *id.* at 957.

46. See *supra* note 5.

47. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend I.

48. J. Madison, *Report on the Virginia Resolutions*, reprinted in 4 ELLIOT'S DEBATES, *supra* note 15, at 576 (emphasis in original).

49. See L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960).

the First Amendment, such as fighting words and private libel.⁵⁰ In short, if other Founders agreed with Madison and Sherman that the rights of speech were “natural rights retained,” then they must have seen the power to control the rights as alienable rather than unalienable.

B. *Natural Rights Today*

Why should anyone care that the Framers’ conception of natural rights is more determinate than scholars have assumed? Since natural rights come from God rather than from government, what more than historical interest turns on identifying the rights that the Framers considered natural? Hamilton himself insisted, after all, that “the sacred rights of mankind are not to be rummaged for, among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature by the hand of divinity itself”⁵¹

Who has the power to look into human nature and to confirm the existence and the scope of natural rights? Even strict constructionists must conclude that the power inheres in the people themselves. “[A]s the will of nature’s God,” wrote James Wilson, the law of nature

is indispensably binding upon the people, in whom the sovereign power resides; and who are, consequently, under the most sacred obligations to exercise that power, or to delegate it to such as will exercise it, in a manner agreeable to those rules and maxims, which the law of nature prescribes to every state⁵²

Framers like Wilson, then, conceived the sovereign people to possess powers similar to the ones that James Otis had attributed to the sovereign parliament in England: as the supreme legislative power, the people are “indispensably” bound by the law of nature, but as the supreme judicial power, the people themselves are the judges of the natural law boundaries that constrain them.⁵³

50. The traditional exceptions include “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1941). For a detailed example of how the Founding generation tried to reconcile its conception of speech as a natural right with legal restrictions on private libel, see TUCKER’S BLACKSTONE, *supra* note 39, at 28–30 (identifying reputation as property interest). To the extent that current obscenity doctrine betrays the Founders’ principles (allowing proscription of offensive views, not just harmful conduct) it should be reconsidered. *See, e.g., Ginzburg v. United States*, 383 U.S. 463, 481 (1966) (Black, J., dissenting). To the extent that the Founders themselves approved similar restrictions, *see, e.g., TUCKER’S BLACKSTONE, supra* note 39, at 29, they appear to have betrayed their own principles.

51. Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1134 (1987) (quoting *The Farmer Refuted, &c.*, in 1 THE PAPERS OF ALEXANDER HAMILTON 81, 122 (H. Syrett ed. 1961)).

52. 1 THE WORKS OF JAMES WILSON 136 (J. Andrews ed. 1896) [hereinafter J. WILSON].

53.

The supreme power in a state, is *jus dicere* only;—*jus dare*, strictly speaking, belongs alone to God Should an act of parliament be against any of *his* natural laws, which are *immutably*

Wilson's conception suggests that each succeeding generation has the power to add to or subtract from the list of its predecessors, since "the law of nature, though immutable in its principles, will be progressive in its operations and effects."⁵⁴ But how to express a new understanding? The most direct way would be to do as the Founders did in the state ratifying conventions, and to propose amendments to the Constitution clearly identifying particular rights as natural.⁵⁵ But for want of a clear statement in a constitutional amendment recognizing a new natural right, or denying an old one,⁵⁶ how can judges identify which rights the people consider natural today?

The Supreme Court has given little guidance on the matter, suggesting vaguely that Ninth Amendment natural rights should be identified in the "traditions and [collective] conscience of our people."⁵⁷ Both liberals and conservatives see the proposal as an invitation to noninterpretivism. Some liberals, eagerly accepting the invitation, propose that judges identify the "collective conscience" of the people in vague "domestic norms" or universal values "discoverable in contemporary documentations of international human rights and expectations."⁵⁸ Some conservatives, pointedly declining the invitation, propose that judges ignore the Ninth Amendment entirely.⁵⁹ On the right and the left, as a result, scholars find the Ninth Amendment "scary"⁶⁰ because, like Justice Black, they see it as a grant of "unbounded judicial authority [which] would make of the Supreme Court's members a day-to-day constitutional convention,"⁶¹ unbounded by the Constitution or by any document legitimately tied to it.

Once again, the conventional assumptions overlook the obvious. Like the people of 1791, the people of 1991 have expressed a national consensus about natural rights in their state constitutions. More than half of the state constitutions today, in their declarations of rights, recognize "natural," "unalienable," or "inherent" rights, including the rights of conscience,⁶² life, liberty, property

true, their declaration would be contrary to eternal truth, equity and justice, and consequently void: and so it would be adjudged by the parliament itself, when convinced of their mistake.

J. OTIS, *THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED* §47 (1764), reprinted in 4 U. MO. STUD. 334 (1929).

54. 1 J. WILSON, *supra* note 52, at 127.

55. *See supra* notes 34-36.

56. *See infra* notes 107-17 and accompanying text.

57. *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) (citation omitted).

58. *See* Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231, 264 (1975).

59. *See, e.g., Testimony of Robert Bork*, Wall St. J., Oct. 5, 1987, §A, at 22 (comparing Ninth Amendment to "inkblot").

60. *See, e.g., J. ELY, supra* note 30, at 34; Berger, *supra* note 31, at 21.

61. *Griswold*, 381 U.S. at 520 (Black, J., dissenting).

62. *See, e.g.,* ARIZ. CONST. art. II, § 12; GA. CONST. art. I, § 1, para. III; KY. CONST. § 1; ME. CONST. art. I, § 3; MO. CONST. art. I, § 5; N.C. CONST. art. I, § 13; OHIO CONST. art. I, § 7; PA. CONST. art. I, § 3; TENN. CONST. art. I § 3; TEX. CONST. art. I, § 6; UTAH CONST. art. I, § 4.

and happiness,⁶³ the right to alter and abolish government,⁶⁴ and the rights of speech.⁶⁵ And the references to natural rights in state constitutions today are not simply artifacts from the Revolutionary Era: in recent amendments, several states have taken care to change some of the language of the Revolutionary articles (substituting "people" for "men," for example),⁶⁶ but have preserved the enumeration of the rights themselves. A few states, furthermore, have added previously unrecognized natural rights (such as privacy in California),⁶⁷ but none has subtracted from the Founders' list.

If the state constitutions mean what they say, and express the people's contemporary beliefs about which rights are natural and which are not, then the Ninth Amendment should be interpreted in light of the natural rights enumerated in the state constitutions. Just as the Supreme Court consults past and present state constitutions as evidence of an evolving "national consensus" about what constitutes "cruel and unusual punishment" under the Eighth Amendment,⁶⁸ so it should consult state constitutions as evidence of an evolving national consensus about which rights are natural and "retained" under the Ninth Amendment.

Having suggested a way of construing the Ninth Amendment strictly without ignoring it entirely, I will now consider the implications of a clash between natural rights retained by the people. I will conclude that the collective right of amendment, as conceived during the founding period, may only be used to secure, rather than to restrain or alienate, the natural rights of individuals.

63. See, e.g., ALA. CONST. art. I, § 1; ARIZ. CONST. art. II, § 4; ARK. CONST. art. II, § 2; CAL. CONST. art. I, § 1; COLO. CONST. art. II, § 3; FLA. CONST. art. I, § 2; HAW. CONST. art. I, § 2; IDAHO CONST. art. I, § 1; ILL. CONST. art. I, § 1; IOWA CONST. art. I, § 1; KY. CONST. § 1; ME. CONST. art. I, § 1; MASS. CONST. art. I; MONT. CONST. art. I, § 3; N.J. CONST. art. I, para. 1; N.M. CONST. art. II, § 4; N.C. CONST. art. I, § 1; OHIO CONST. art. I, § 1; OKLA. CONST. art. II, § 2; PA. CONST. art. I, § 1; S.D. CONST. art. VI, § 1; UTAH CONST. art. I, § 1; VA. CONST. art. I, § 1; W. VA. CONST. art. III, § 1; WYO. CONST. art. I, § 2.

64. See, e.g., ALA. CONST. art. I, § 2; ARK. CONST. art. II, § 1; GA. CONST. § 2, para. 2; KY. CONST. § 4; ME. CONST. art. I, § 2; MD. CONST. art. I; MASS. CONST. pt. I, art. VII; PA. CONST. art. I, § 2; VA. CONST. art. I, § 3; W. VA. CONST. art. III, § 3; WYO. CONST. art. I, § 1.

65. See *supra* note 6 and accompanying text. For recent Supreme Court opinions suggesting that speech is an unalienable natural right, see *infra* notes 109-10. Comparatively few state constitutions may recognize speech as a natural right today because it was not formally recognized as natural in state constitutions at the founding. But to doubt that speech is a natural right is to doubt not only the Founders' conclusions, but also the Founders' logic, which suggests that the rights of speech must be gifts of God rather than government. See *supra* note 39. If, however, you are not persuaded that the people of 1991, like the people of 1791, believe speech to be a natural right, test the theory of unconstitutional amendments by substituting for the Flag Burning Amendment an amendment purporting to alienate the prototypically unalienable rights of religious conscience. See *infra* note 112 and accompanying text.

66. See, e.g., CAL. CONST. art. I, § 1 (amended Nov. 7, 1972); see also MASS. CONST. art. CVI ("All men" changed to "All people").

67. See CAL. CONST. art. I, § 1 (Nov. 7, 1972 amendment added word "privacy" to the rights of life, liberty, property, and happiness).

68. See *supra* note 7.

II. NATURAL RIGHTS LIMITATIONS ON THE AMENDMENT POWER

A. *Limitations Implicit in Article V*

An unconstitutional amendment sounds like a contradiction in terms. Article V, after all, says that constitutional amendments shall be proposed by Congress or by a convention called at the request of state legislatures, and may be ratified by state legislatures or by conventions in three-fourths of the states.⁶⁹ But it says nothing about limitations on the amendment process. Most commentators assume, accordingly, that Article V has no unenumerated limitations,⁷⁰ although the ratification of the Eighteenth and Nineteenth Amendments provoked a slew of arguments that the Amendments unconstitutionally violated principles of state sovereignty.⁷¹

More recently, there has been a small but growing literature on implicit limitations inside and outside of Article V.⁷² Charles Black and Akhil Amar have suggested that the First Amendment, in particular, may be unrepealable because of its special role in "keeping open the channels of constitutional change."⁷³ Bruce Ackerman and Amar, furthermore, have suggested that while Article V codifies the unalienable right to alter and abolish government, it does not limit the right. Noting that the ratification of the Constitution itself violated the procedures enumerated in the Articles of Confederation and in the Revolutionary state constitutions, they argue that the Constitution may be popularly amended in ways other than those explicitly set forth in Article V.⁷⁴ But no commentator has focused on limitations on the unalienable right to alter and abolish government itself, from which amendment inside and outside of Article V is derived. Those limitations were discussed clearly between 1776 and 1791

69. U.S. CONST. art. V.

70. See, e.g., Dellinger, *Constitutional Politics: A Rejoinder*, 97 HARV. L. REV. 446, 448 (1983).

71. See, e.g., Marbury, *The Nineteenth Amendment and After*, 7 VA. L. REV. 1, 5-6 (1922) (Nineteenth Amendment deprives unconsenting states of sovereign power to regulate elections); Skinner, *Intrinsic Limitations on the Power of Constitutional Amendment*, 18 MICH. L. REV. 213, 218-23 (1920) (states may not ratify amendments surrendering police powers reserved to them by Ninth and Tenth Amendments); Brown, *The Amending Clause Was Provided For Changing, Limiting, Shifting, Or Delegating "Powers of Government." It Was Not Provided for Amending "The People." The 19th Amendment is Therefore Ultra Vires*, 8 VA. L. REV. 237, 241 (1922); see also Abbot, *Inalienable Rights and the Eighteenth Amendment*, 20 COLUM. L. REV. 183, 185-87 (1920) (Eighteenth Amendment might violate the "inalienable," "natural and inherent" right to pursue happiness through alcohol). The Supreme Court upheld the constitutionality of both amendments, nevertheless. See *Lesser v. Garnett*, 258 U.S. 130 (1922); *National Prohibition Cases*, 253 U.S. 350, 362-63 (1920).

72. See, e.g., Linder, *What in the Constitution Cannot be Amended?*, 23 ARIZ. L. REV. 717 (1981) (Article V cannot be amended to create additional limitations on amending power); Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 754-57 (1980) (amendments violating "human dignity" are void).

73. See Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1045 n.1 (1989); C. BLACK, *PERSPECTIVES IN CONSTITUTIONAL LAW* 91 (1970).

74. See Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1014-23 (1984); Amar, *supra* note 73.

in the debates about who would be sovereign—the American people or their government.

In the Declaration of Independence, Jefferson did not assert a right to change government at will, but claimed that “it is the right of the people to alter or to abolish” government “whenever any form of government becomes destructive of” the ends for which it was instituted—namely, “to secure” the “inalienable rights” of the people.⁷⁵ He then adds another precondition: “a long train of abuses & usurpations” evincing a design to place mankind “under absolute despotism.”⁷⁶ Both conditions, as others have noted,⁷⁷ seem to come from Locke, who is similarly explicit that government can only be changed when the legislature breaks the social compact and assaults the retained natural rights it had contracted to protect.

Jefferson’s Lockean conception of the right to alter and abolish government dominates the Revolutionary constitutions from 1776 to 1784, in which government was still, by and large, conceived as a Lockean compact between the people and the sovereign government: several state constitutions suggest that the unalienable collective right to alter and abolish government can only be exercised whenever government is acting contrary to its purposes which include enabling “the individuals who compose it to enjoy their natural rights.”⁷⁸ Under the Revolutionary conception, then, the right of amendment, which may only be exercised to defend unalienable individual rights, could not be invoked to “alter and abolish” them.⁷⁹

In the ratification period, from 1789 to 1791, the location of sovereignty shifted, but the scope of sovereignty did not. Following the suggestion of James Wilson in Philadelphia, the state conventions came to agree that the American people, not their governments, were sovereign, and having “regained all their natural rights,” after the revolution, the people “possess their liberty neither by grant nor contract.”⁸⁰ Reflecting the new understanding of sovereignty, the amendments proposed by the state ratifying conventions suggest that the right to alter and abolish government may be exercised at pleasure rather than only

75. The Declaration of Independence para. 2 (U.S. 1776).

76. *Id.*

77. See *supra* note 41.

78. See PA. CONST. of 1776, preamble, reprinted in 2 B. POORE, *supra* note 21, at 1540-41; VT. CONST. of 1777, preamble, reprinted in 2 *id.* at 1857; MA. CONST. of 1780, preamble, reprinted in 1 *id.* at 956. Other states suggest that the right to change government can be exercised “whenever the ends of government are perverted.” See MD. CONST. of 1776, § 4, reprinted in 1 *id.* at 817; N.H. CONST. of 1784, § 10, reprinted in 2 *id.* at 1281; DEL. DECLARATION OF RIGHTS of 1776, § 5, reprinted in 1 B. SCHWARTZ, *supra* note 14, at 277.

79. James Otis cites Locke’s *Second Treatise* on behalf of the proposition that “the community may be said . . . to be always the supreme power, but not as considered under any form of government, because this power of the people can never take place, till the government be dissolved,” and government can never be dissolved until it infringes the retained natural rights of individuals. J. OTIS, *supra* note 53, § 23.

80. 2 B. SCHWARTZ, *supra* note 14, at 645.

in the face of oppression.⁸¹ At the same time, convention delegates continued to recognize the basic tenet of social compact theory which says that the sovereign power, by definition, may only exercise control over natural rights when the powers of control have been explicitly surrendered by individuals.⁸² And individuals, by definition, have no power to surrender or alienate their retained natural rights.⁸³

For this reason, even James Wilson, the apostle of popular sovereignty, stressed that the newly sovereign American people, like the formerly sovereign English parliament, could not exercise the right of amendment to "alter" or "abolish" the retained natural rights of individuals: "To diminish, to alter, much more to abolish this law [of nature], is a vain attempt. Neither by the senate, *nor by the people*, can its powerful obligation be dissolved."⁸⁴ In the process, Wilson identifies natural rights as an implicit limitation (enforceable only by the people themselves) on the people's power to amend the Constitution outside of Article V.

It is axiomatic in Federalist theory, furthermore, that the representatives of the people, acting within Article V, cannot exercise broader power than the sovereign people, who delegated the powers in the first place.⁸⁵ What the people may not do, in other words, their representatives may not do; and retained natural rights are an implicit limitation on amendments inside or outside of Article V.

B. *Enforcing the Ninth Amendment*

But how are the implicit limitations to be enforced? At the very least, commentators agree, natural law limitations are morally and politically enforceable; and dissenters would be justified in resorting to civil disobedience and in refusing to obey an unconstitutional amendment.⁸⁶ But are natural law limitations on the amendment power judicially enforceable, as well? In this section, I will argue that they are—that the implicit limitations in Article V (derived from the history and structure of the Constitution as a whole) are explicitly incorporated by reference in the text of the Ninth Amendment. Thus,

81. See, e.g., the 1788 amendment proposed by New York: "That the Powers of Government may be reassumed by the People, whensoever it shall become necessary to their Happiness . . ." 2 B. SCHWARTZ, *supra* note 14, at 911.

82. See J. LOCKE, *supra* note 18, § 135: "For [the supreme power] being but the joint power of every member of the society given up to that person or assembly which is legislator, it can be no more than those persons had in a state of Nature before they entered into society, and gave it up to the community."

83. Richard Maclaine of North Carolina said: "[I]f there be certain rights *which never can*, nor ought to, be given up, these rights cannot be said to be given away, merely because we have omitted to say that we have not given them up." 4 ELLIOT'S DEBATES, *supra* note 15, at 161 (July 29, 1788) (emphasis added).

84. 1 J. WILSON, *supra* note 52, at 125 (emphasis added).

85. "To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves . . ." THE FEDERALIST No. 78, at 467 (A. Hamilton).

86. See, e.g., Rapaczynski, *supra* note 26, at 178-88.

the limitations should be enforced by judges according to familiar rules defining the relationship between positive and natural law.

A well-worn debate persists about whether Ninth Amendment natural rights are judicially enforceable in the face of any positive law to the contrary. The Supreme Court has suggested, vaguely, that they may be;⁸⁷ but scholars are divided. After disagreeing vigorously about whether the Founders intended enforcement,⁸⁸ and about whether natural rights historically have been enforced,⁸⁹ the debate usually focuses on questions of textual construction and of prudence. Those who favor enforcement, relying on the language of the Amendment, conclude that to recognize that rights are "retained by the people," yet to deny them judicial enforcement, would be to "deny or disparage" them, as the Ninth Amendment forbids.⁹⁰ Those who oppose enforcement argue that rights "retained by the people" are not embodied in the Constitution, and that suits brought under retained rights do not "arise under" the Constitution, as Article III requires.⁹¹

In the end, both camps seem to recognize that the history and the text is indeterminate, and their disagreement focuses on questions of prudence. Presuming that unenumerated rights cannot be identified with certainty, members of both camps conclude that judicial enforcement would be "scary."⁹²

But the premise of both camps, I have argued, is flawed, and the prudential argument against enforcement is unwarranted. By suggesting that judges need not resort to noninterpretive review to identify which rights are "retained by the people," the argument in Part I undercuts the prudential argument against judicial enforcement. "If a principled approach to judicial enforcement of the

87. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion) (Ninth Amendment intended judicial enforcement of fundamental unenumerated rights "indispensable to the enjoyment" of enumerated rights); see also *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 486-95 (1965) (Goldberg, J., concurring).

88. Compare THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 5, at 20-31 (Madison intended judicial enforcement of unenumerated rights) with Berger, *supra* note 31, at 8-9 (Madison intended judicial enforcement only of "expressly stipulated" rights).

89. Compare Sherry, *supra* note 51 (early Supreme Court cases enforced unenumerated natural rights in the face of contrary positive law) with Levinson, *supra* note 10, at 148 (supporters of judicially enforceable Ninth Amendment natural rights "must confront the existence within our positive jurisprudence of a variety of laws that enforced or otherwise legitimated the practice of chattel slavery."). Robert Cover demonstrates conclusively that, in the face of explicit constitutional protections for slavery, the abolitionist courts refused to heed arguments from counsel that slavery violated natural law. R. COVER, JUSTICE ACCUSED 34 (1975). But the slavery cases were not based on the premise that natural rights could never be judicially enforced; instead, *Dred Scott v. Sandford*, the most infamous of them, suggested that the natural right of liberty was embedded in the Constitution, but that the Founders did not intend to extend it to Black people, whom some of them considered property and not part of "We the People." 60 U.S. (19 How.) 393, 410 (1856). But see *id.* at 575 (Curtis, J., dissenting). In short, the slavery cases leave open the possibility that a natural right clearly retained by the people could be judicially enforced through the Ninth Amendment.

90. See, e.g., Black, *On Reading and Using the Ninth Amendment*, in THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 5, at 339.

91. Berger, *supra* note 31, at 9.

92. See *supra* notes 60-61 and accompanying text.

Constitution's open-ended provisions" can be found, even skeptics like John Hart Ely concede that the Ninth Amendment should be judicially enforced.⁹³

Assuming that natural rights are judicially enforceable under the Ninth Amendment in the face of positive statutory law to the contrary, they must also be enforceable in the face of enumerated constitutional powers to the contrary. Basic canons of construction say that the exercise of enumerated congressional powers (the commerce clause, for example) is subject to the restrictions of the Bill of Rights; and if a state legislature or convention, as well as Congress, exercises its enumerated powers in a way that violates a reserved right, then the exercise must be unconstitutional, whether or not the reserved right is enumerated.

But even if judges recognize their responsibility to contain enumerated powers within the boundaries of reserved rights, the prospect of striking down an "unconstitutional" amendment raises prudential questions entirely separate from the constitutional ones. The Flag Burning Amendments, for example, were proposed to "overrule" the Supreme Court's holdings in *Texas v. Johnson*⁹⁴ and *United States v. Eichman*.⁹⁵ And although the Court has not explicitly decided whether the substantive (as opposed to the procedural)⁹⁶ validity of a constitutional amendment is a nonjusticiable political question, justices and commentators have noted that, when amendments are designed to reverse court decisions, allowing judicial review of the amendments' merits threatens to "subordinate the amendment process to the legal system it is intended to override."⁹⁷

An amendment purporting to grant a power that violates a retained natural right presents a special case, though. By striking down an enumerated power on the basis of a Ninth Amendment natural right, the Supreme Court would not necessarily entrench its own decisions and thwart the will of the sovereign people. Instead, by striking down an amendment that appears to violate a right "retained by the people," the Supreme Court, in effect, would "remand"⁹⁸ the

93. J. ELY, *supra* note 30, at 41.

94. 109 S. Ct. 2533 (1989).

95. 110 S. Ct. 2404 (1990).

96. *But see* *Coleman v. Miller*, 307 U.S. 433, 450 (1939) (timeliness of ratification, and effect of prior rejection, of constitutional amendment is nonjusticiable "political question").

97. *See* Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 442-43 (1983); *see also* *Goldwater v. Carter*, 444 U.S. 996, 1001 n.2 (1979) (Powell, J., concurring in the judgment).

98. *Compare* statutory remands endorsed by A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-98 ("passive virtues") with G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) ("judicial sunseting").

amendment back to the people or to their Article V delegates⁹⁹ and ask them if they really believe the right to be natural and retained.

If the proposers and ratifiers, on remand, *are* determined to overrule the Supreme Court, they may not merely express their legislative *will* (we believe Congress should have the power to regulate flag burning); they must also provide a clear statement of their judicial *reason* (because we no longer believe the rights of speech to be natural). In this way, judicial review of the substance of an amendment does not thwart popular sovereignty, but merely ensures that it is deliberately exercised as the Founders intended—within the boundaries of natural law, as defined by the people themselves. And in this way, the Ninth Amendment does not *create* limitations on the amendment power (for that attempt itself would be unconstitutional),¹⁰⁰ but merely makes explicit the limitations already implicit in the history and theory of Article V.

III. WAS THE FLAG BURNING AMENDMENT UNCONSTITUTIONAL?

To test these theories in practice, imagine that Congress had proposed, and the states had ratified, the Flag Burning Amendment originally proposed by Senator Dole: “The Congress and the States shall have the power to prohibit the physical desecration of the Flag of the United States.”¹⁰¹ Minutes after Secretary of State Baker certifies the ratification, Congress reenacts the Flag Protection Act of 1989,¹⁰² and thirteen earnest law students, calling themselves Lawyers for Original Intent Soon (LOIS), self-consciously burn thirteen flags on the steps of the Capitol. Immediately arrested, and convicted at trial, they argue on appeal that both the Act and the Amendment violate the natural rights of speech, “retained by the people” and protected by Article V and by the Ninth Amendment. The appellate court reverses, and *United States v. Original Intent* ambles up to the Supreme Court. Result?

As proposed, the Dole amendment would not force a court to reach the Ninth Amendment; for on its face, it appears to violate the First Amendment. During the Senate Judiciary Committee hearings on flag desecration in 1989, several witnesses suggested that the rights reserved by the First Amendment would “trump” the powers granted by the Flag Burning Amendment.¹⁰³ Since both supporters and opponents of the Amendment stressed that they had no

99. A radical believer in amendment outside Article V might argue that as only the people themselves can redefine the boundaries of natural law, only an amendment ratified by majority vote of the people of the United States could be enforced by the courts as a definitive statement of the people's contemporary beliefs about natural rights. See Amar, *supra* note 73, at 1104 n.211. James Wilson took a less dramatic view, suggesting that the ratification procedures enumerated in Article V are an explicit delegation from the people to their representatives of the supreme judicial power to interpret the limits of natural law. See *supra* text accompanying note 52.

100. See Amar, *supra* note 73, at 1045 n.1.

101. See *supra* note 1.

102. 18 U.S.C.A. § 700 (Supp. 1990).

103. *Hearings*, *supra* note 3.

intention of overriding the First Amendment,¹⁰⁴ the Flag Burning Amendment, even read broadly, would have done nothing more than enumerate Congress's power to pass legislation concerning the Flag, a power that has always been assumed to exist.¹⁰⁵ And like the powers granted in Article I and in the final sections of the Thirteenth, Fourteenth, and Fifteenth Amendments, the power granted by the Dole amendment would be "limited and constrained by the Bill of Rights."¹⁰⁶

Senate witnesses agreed, however, that the Flag Burning Amendment could exempt itself from the First Amendment as long as it did so explicitly. Professor Eugene W. Hickok, Jr., proposed the following remedy: "The First Amendment to the Constitution shall not be construed as to limit the power of Congress and the States to prohibit the physical desecration of the flag of the United States."¹⁰⁷

But the Hickok amendment would not have cured the defects of the Dole amendment, as the opposing witnesses assumed. The argument in Part II suggests that even if the Flag Burning Amendment *had* explicitly carved out an exception to the First Amendment (or even if it had repealed the First Amendment entirely) it still would have been unenforceable and unconstitutional.

Assume first, for the sake of argument, that freedom of speech is an unalienable rather than an alienable natural right, as two state constitutions declare,¹⁰⁸ as Justice Black said he believed,¹⁰⁹ and as one Supreme Court opinion suggests.¹¹⁰ If "unalienable" is being used literally rather than rhetorically, then the Hickok amendment would be unconstitutional even with its explicit First Amendment override. Faithfully construing the text of the Hickok Amendment and the intent of its framers and ratifiers, a court would have to conclude that the Amendment was intended to do what it says: to remove Congress' power to punish flag burning from the restrictions of the First Amendment. But even if the court concluded that the right to burn flags was no longer an enumerated right, protected by the First Amendment, it would

104. Chairman Biden stressed that supporters of the Flag Burning Amendment and of the Flag Protection Act "are not only reluctant, but are insistent that we are not amending the first amendment" *Id.* at 558; see also *id.* at 488.

105. *Id.* at 547 (statement of Prof. Dellinger).

106. *Id.*

107. *Id.* at 597.

108. See *supra* note 6.

109. See *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 67 (1961) (Black, J., dissenting) ("The Court, by stating unequivocally that there are no 'absolutes' under the First Amendment, necessarily takes the position that even speech that is admittedly protected by the First Amendment is subject to the 'balancing test' In my judgment, such a sweeping denial of the existence of any inalienable right to speak undermines the very foundation upon which the First Amendment, the Bill of Rights, and, indeed, our entire structure of government rest.") (footnote omitted).

110. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 149 (1967) (Harlan, J.) ("dissemination of the individual's opinions on matters of public interest" is an "unalienable right").

remain an unalienable right, by definition "retained by the people," and protected by the Ninth Amendment.

The argument in Part II suggests that a clash between a right reserved by the Ninth Amendment and a power granted by the Flag Burning Amendment is no different than the clash between a power granted by the Flag Burning Amendment and a right reserved by the First Amendment. In both cases, constitutional powers must be exercised within the boundaries imposed by reserved rights. Just as Congress may not exercise the powers granted by section 5 of the Fourteenth Amendment to enforce the equal protection clause by requiring all newspapers to promote equality in their daily editorials,¹¹¹ so it could not exercise its Twenty-Seventh Amendment power to infringe the rights of political speech retained by the people and protected by the Ninth Amendment.

If the power granted by the Flag Burning Amendment violates a Ninth as well as a First Amendment right, could Congress cure the defect by repealing the Ninth as well as the First? Not without a more explicit statement of legislative reasoning. If natural rights are judicially enforceable whether or not they are enumerated, they would remain judicially enforceable whether or not there were a Ninth Amendment. For the argument in Part II suggests that the Ninth Amendment merely makes explicit limitations that are already implicit in the history of Article V and the rest of the original Constitution: namely, that individuals may not "alienate," and Congress may not exercise, the power to control unalienable rights under any circumstances.

But the starkness of the claim calls the premise into question. Freedom of religious worship, I have argued, is clearly an unalienable right, and it may not be controlled by Congress under any circumstances: a constitutional amendment that required (as opposed to permitted) all students to recite the pledge of allegiance would be unconstitutional even if there were no free exercise clause.¹¹² But freedom of speech, for the reasons I have suggested, must be an alienable rather than an unalienable natural right if more than two centuries of legislative restrictions on speech are constitutional.¹¹³

Even if speech is an alienable rather than an unalienable natural right, however, it still could not be regulated by the Dole or Hickok amendments. Recall that the power to control alienable natural rights can be surrendered by the people and controlled by government only in exchange for an "equivalent": greater security and safety for individuals and for society. When no "equivalent" can be offered or received, then the surrender is "void" and the right cannot be controlled.¹¹⁴

111. *Hearings*, *supra* note 3, at 538-39 (statement of Prof. Dellinger).

112. *Cf. West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 643 (1943).

113. *See supra* text accompanying notes 46-50.

114. *See supra* notes 21-22 and accompanying text.

If freedom of speech is an alienable natural right, then the congressional power that the Flag Burning Amendment purports to grant is void, for it offers no "equivalent" in exchange for the power surrendered. In *Texas v. Johnson*, the state admitted, and the Court emphasized, that "'no actual breach of the peace occurred at the time of the flag burning or in response to the flag burning.'" ¹¹⁵ In holding that flag burning is an expressive activity ¹¹⁶ and that the power to control it may only be exercised by Congress when the expression poses no "imminent" threat to persons or property, ¹¹⁷ the *Johnson* Court unwittingly treated speech as a textbook example of an alienable natural right. In short, even if speech is an alienable natural right, the power to control it must be "retained by the people" in the circumstances contemplated by the Flag Burning Amendment. Under both the Dole and Hickok amendments (or under an amendment repealing the First or Ninth Amendments entirely), the retained right trumps the enumerated power. The spirit of the LOIS' argument should be accepted and the students should be released.

By striking down the Dole and Hickok amendments the Court would force the people and their representatives to debate seriously about whether they really believe the rights of speech to be natural. If they do not, Congress could draft a judicially enforceable Flag Burning Amendment. But instead of expressing the people's political will that the Flag should be protected, the drafters of the Amendment would have to express the people's deliberate judgement that the rights of speech should not be considered natural. Something like this would do the trick: "Freedom of speech shall not be construed as a natural right retained by the people and protected by the First and Ninth Amendments."

The difference between the constitutional and unconstitutional Flag Burning amendments is more than an extravagant word game. The people's representatives, after all, would be less eager to deny that speech is a God-given right than to deny that flag burning is a First Amendment right. And merely by deliberating about the question, the ratifiers of the amendment would be exercising their supreme judicial as well as their supreme legislative power, as James Wilson envisioned.

IV. CONCLUSION

By refusing to enforce the unconstitutional Flag Burning Amendments, a Court would defer to, rather than thwart, the sovereignty of the people. It would remind the people that they, not their representatives in Congress and in the courts, possess the supreme political and judicial power. And it would remind the people that, as supreme judges, they have a duty to identify the natural rights that, as supreme legislators, they may not alter or abolish.

115. 109 S. Ct. at 2541 (1989) (citation omitted).

116. *Id.* at 2539-40.

117. *Id.* at 2542 (citation omitted).